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NO. 83-983

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1983

REUVEN TAKO and JACKIE TAKO, his wife,

Petitioners,

vs.

MAYER AND CIE, a German Corporation,
and MAYER ROTHKOPF INDUSTRIES, INC.,
a foreign corporation,

Respondents,

On Writ of Certiorari to the District Court
Of Appeal of Florida for the Third District

BRIEF OF RESPONDENT

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BRIEF IN OPPOSITION TO ACCEPTANCE OF JURISDICTION

A. QUESTION PRESENTED FOR REVIEW

Pursuant to Rule 34.2, United States Supreme Court Rules, it is respectfully submitted that the Question Presented for Review set forth in the Petition for Certiorari is inaccurate and insufficient to characterize the issue before the Court.

The threshold issue is whether the federal question which the petitioners claim is at issue was timely raised. The petitioners admit that the federal question was raised for the first time in their Motion for Rehearing of the decision entered by the District Court of Appeal of Florida, Third District. The District Court's decision is the subject of the Petition for Certiorari.

The petitioners recognize federal law is well settled that federal questions raised for the first time on motion for rehearing from the highest state appellate court are untimely. The petitioners claim, however, that

the District Court's decision "unexpectedly" gave rise to the federal question.

As discussed below, the record reveals that the issue before the District Court of Appeal was identical to that before the trial court. The decision of the District Court was a per curiam affirmance without opinion of the final summary judgment rendered by the trial court. The District Court's decision could not, therefore, unexpectedly give rise to any issue. Thus, the initial question before this Court is whether certiorari jurisdiction should be exercised to review asserted federal constitutional issues first raised on motion for rehearing in a state appellate court.

If this Court determines it is appropriate to proceed further, the second question presented is whether a cause in the procedural posture of the instant case is an appropriate subject for exercise of this Court's certiorari jurisdiction. The decision of the District Court of Appeal was without opinion. As such, it has no precedential value and does

not create conflict with decisions of any other court. A review by this Court will serve only to resolve the dispute between the parties. The question is whether a per curiam affirmance without opinion by a state appellate court in a civil case can be of sufficient importance to justify the exercise of this Court's certiorari jurisdiction.

If the Court finds it necessary to reach the merits, this cause presents one final question for review. The petitioners claim that their rights to equal protection and due process were violated by the unconstitutional application of the state rules of civil procedure. The rule in question deals with the relation back of amendments to the date of an original pleading.

The petitioners/plaintiffs sought to file a fourth amended complaint after the statute of limitations had run on the cause of action, arguing that this complaint should relate back to the date of filing of the third amended complaint, which had been filed prior to the

running of the statute. The trial court found that the fourth amended complaint did not relate back for purposes of tolling the statute of limitations because at no time prior to the running of the statute had the plaintiff alleged facts which could have brought the defendants within the jurisdiction of the court. The question, therefore, is whether under these facts, which are set forth in greater detail below, the decision of the District Court of Appeal affirming the trial court's grant of summary final judgment in favor of the defendants/respondents amounted to a denial of the petitioner's federal constitutional rights to due process and equal protection of the law.

B. TABLE OF CONTENTS

		PAGES
A.	Question Presented for Review	1-4
B.	Table of Contents	5
C.	Table of Authorities	6-7
D.	Jurisdiction	8
E.	Statement of the Case	8-10
F.	Summary of Argument	10-12
G.	Argument	12-28
H.	Conclusion	28
I.	Certificate of Service	28-29
J.	Appendix	

C. TABLE OF AUTHORITIES

CASES	PAGES
Acme Specialty Corp. v. City of Miami, 292 So.2d 379 (Fla. 3d DCA 1974)	18
Brinkerhoff-Farris Trust & Savings Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451 74 L.Ed. 1107 (1930)	13, 15, 16
Burnstein v. Columbia Broadcasting System, Inc., 291 F.2d 8 (7th Cir. 1961)	23, 24
Clark v. Realty Investment Center Inc., 252 So.2d 589 (Fla. 3d DCA 1971)	23
Department of Legal Affairs v. District Court of Appeal, Fifth District, 434 So.2d 310 (Fla. 1983)	18
Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed. 1283 (1958)	13
Herndon v. State of Georgia, 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530 (1935)	13
Jones v. Superintendent, Virginia State Farm, 465 F.2d 1091 (4th Cir. 1972)	18
Kane v. Central American Mining and Oil, Inc., 235 F.Supp. 559 (U.S.D. N.Y. 1964)	25

Klosenski v. Flaherty,
116 So.2d 767 (Fla. 1959) 22

Layne and Bowler Corp. v.
Western Wellworks,
261 U.S. 387, 43 S.Ct. 422,
67 L.Ed. 712 (1923) 19, 20

Lillibridge v. Riley,
316 F.2d 232 (5th Cir. 1963) 26

Magnum Company v. Coty,
262 U.S. 159, 43 S.Ct. 531,
67 L.Ed. 922 (1923) 20, 21

McCorquodale v. State of Texas,
211 U.S. 432, 29 S.Ct. 146,
53 L.Ed. 269 13

Osman v. Drashovich,
314 F.Supp. 1115 (E.D. Wisc.
1970) 27

Rice v. Sioux City Cemetery,
349 U.S. 70, 75 S.Ct. 614,
99 L.Ed. 897 (1955) 20

State of Missouri v. Gehner
281 U.S. 313, 50 S.Ct. 326,
74 L.Ed. 870 (1930) 13, 15

OTHER AUTHORITIES

Florida Rules of Civil Procedure

Rule 1.190(c) 23

Federal Rules of Civil Procedure

Rule 15(c) 21

Title 28 United States Code

§ 1257(3) 8
§ 1653 21

D. JURISDICTION

It is submitted that there is no violation of any title, right, privilege or immunity under the Constitution of the United States to warrant the exercise of this Court's certiorari jurisdiction pursuant to Title 28 U.S.C. § 1257(3).

E. STATEMENT OF THE CASE

The statement of the case set forth in the Petition for Certiorari omits the following facts. The respondents/defendants are non-resident foreign corporations. The petitioners attempted to serve their third amended complaint. Respondents' motion to quash service of process was granted by the trial court. (App. L.)[1] The petitioners appealed.

The District Court of Appeal of Florida, Third District, affirmed, holding that the complaint failed to allege the jurisdictional

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[1] The abbreviation "App." refers to the Appendix to the Petition for Certiorari. The abbreviation "R. App." refers to the Appendix to the Respondents' Brief.

facts necessary to bring the respondents within the purview of any of Florida's long-arm statutes. (App. K.) Subsequently, the petitioners filed a fourth amended complaint. (App. J.) It was not disputed that the fourth amended complaint was filed in excess of four years from the date of the accident which gave rise to the cause of action and, therefore, was not within the applicable statute of limitations. (Petition for Certiorari, p. 4.)

A hearing was held on the respondents' motion to dismiss and motion for summary judgment. (App. G.) It was the petitioners' position that the fourth amended complaint should relate back to the date of filing of the third amended complaint. The trial court found that the fourth amended complaint did not relate back because the third amended complaint did not allege jurisdiction over any of the defendants. (App. G.) Final summary judgment was entered for the defendants. (App. F.) The petitioners appealed. There was only one issue before the District Court

of Appeal stated as follows by the petitioners:

> "WHETHER THE DATE OF FILING AN AMENDED COMPLAINT, CONTAINING NO NEW THEORIES OF LIABILITY, RELATES BACK TO THE DATE OF FILING THE PRIOR COMPLAINT FOR PURPOSES OF THE STATUTE OF LIMITATIONS." (R, App. A.)

The issue was stated by the respondents as follows:

> "WHERE A COMPLAINT, FILED WITHIN THE LIMITATION PERIOD, CONTAINS NO JURISDICTIONAL ALLEGATIONS WHICH COULD BRING DEFENDANTS WITHIN THE JURISDICTION OF THE TRIAL COURT, THE STATUTE OF LIMITATIONS IS NOT TOLLED AND A SUBSEQUENT COMPLAINT WITH THE NECESSARY ALLEGATIONS FILED OUTSIDE THE PERIOD OF LIMITATIONS SHOULD BE DISMISSED." (R. App. A.)

The District Court of Appeal affirmed without opinion. (App. D.) The petitioners then sought review by this Court with the filing of the Petition for Certiorari.

F. SUMMARY OF ARGUMENT

Federal law is clear that a federal question raised for the first time in a motion for

rehearing in the highest state appellate court is untimely for purposes of this Court's jurisdiction. The petitioners claim that the District Court's decision unexpectedly gave rise to the federal question. The only issue before the District Court of Appeal was whether the fourth amended complaint related back to the filing of the third amended complaint so as to bring the fourth amended complaint within the statute of limitations. It is precisely the District Court's decision on this question which the petitioners claim is an unconstitutional application of the rule of procedure concerning the relation back of amendments. As this precise issue was clearly before both trial and appellate courts, petitioners claim that the decision was unexpected is totally without merit. Petitioners failed to timely raise a federal question, if one existed.

Secondly, this cause is not appropriate for the exercise of this Court's certiorari jurisdiction because the District Court's per

curiam affirmance is without precedential value. This Court's certiorari jurisdiction should be utilized to determine important federal questions which have wider application than the mere resolution of the dispute between two parties.

Thirdly, petitioners' constitutional entitlement to due process and equal protection was not violated by the District Court's decision. The third amended complaint did not toll the statute of limitations where that complaint contained no allegations which could ever bring the defendants within the personal jurisdiction of the trial court.

G. ARGUMENT

It has long been the established rule that a federal question raised for the first time after judgment in a petition for rehearing, after decision by the highest state court is untimely for purposes of this Court's jurisdiction unless the state court actually enter-

tains the question and decides it.[2] Herndon v. State of Georgia, 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530 (1935); Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed. 1283 (1958).

The petitioners claim that they raised the federal question at the earliest opportunity, as the District Court's opinion unexpectedly gave rise to the constitutional issues. The petitioners cite Brinkerhoff-Farris Trust & Savings Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930) and State of Missouri v. Gehner, 281 U.S. 313, 50 S.Ct. 326, 74 L.Ed. 870 (1930), in support of their position that the federal question was timely raised. Those cases are distinguishable from the case at bar and do not apply here.

In Brinkerhoff-Farris, supra, a corporate

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[2] An order stating that a motion for rehearing has been considered and denied, as in the instant case (App. B.), is insufficient to show that the court entertained the asserted federal question. McCorquodale v. State of Texas, 211 U.S. 432, 29 S.Ct. 146, 53 L.Ed. 269.

taxpayer sought relief from an alleged discriminatory tax assessment by a county taxing authority. The taxpayer sought relief in equity claiming that an administrative remedy did not exist to provide a right to appeal to the county or state boards of equalization. The taxing authority claimed that the taxpayer was barred from equitable relief because it was guilty of laches in failing to pursue its legal remedies before the county and state boards of equalization.

The state supreme court agreed with the taxpayer that the state and county boards of equalization had no authority to grant the relief sought. The court, however, held that the taxpayer should have sought relief before the state tax commission. This holding expressly overruled prior decisions of the state supreme court which held that the state tax commission had no authority to grant the relief sought by the taxpayer. The court thus held that the taxpayer was barred from seeking relief in equity as it had failed to pursue

its legal remedies. The taxpayer then raised the federal question in a motion for rehearing.

This Court, in determining that the court's decision unexpectedly gave rise to the federal question, found that the possibility of relief before the tax commission was not suggested by anyone in the entire litigation until the state supreme court filed its opinion. It was then too late for the taxpayer to complain to the tax commission. Unlike Brinkerhoff-Farris, supra, where the relevant issue decided by the state court was never raised by any of the parties, the issue which petitioners now assert gives rise to a federal question was the only issue before the state trial and appellate courts. (R. App. A; App. G.) That petitioners did or did not assert deprivation of federal constitutional rights does not cure the untimeliness of doing so in the petition for rehearing.

The facts of State of Missouri v. Gehner, supra, may similarly be distinguished from the

facts of the case at bar. The subject of that litigation was a tax assessment on the property of an insurance company. In proceedings before an administrative body, it was determined that the company's United States bonds were not taxable. The administrative board completely eliminated the U.S. bonds from its calculation of the tax. The taxability of the bonds was not an issue between the parties when the case went to the state supreme court.

That court, however, held that a state statute required company liabilities to be charged against all assets, including the U.S. bonds, for purposes of calculating the tax. The taxpayer then raised, in a petition for rehearing, federal questions relating to the state's right to tax the bonds. As in Brinkerhoff, supra, the issue decided by the state court which gave rise to the federal question had not been raised by the parties to the litigation. In the instant case, whether the amended complaint related back to an

earlier pleading was the only issue raised by the parties. (R. App. A.)

The principle which allows this Court to entertain federal issues first raised in a motion for rehearing is not applicable to the instant case. The only thing in the District Court's per curiam affirmance which petitioners did not anticipate was that they did not prevail. The relation back issue was the only issue before the appellate court, as it had been before the trial court. (App. G; R. App. A.)

If losing is the only criteria for "unexpectedness", then every party who takes an appeal and receives an adverse decision would be entitled to raise federal issues and seek review in this Court. Such is obviously not the case.

Secondly, it is suggested that it would be inappropriate for this Court to exercise its discretionary jurisdiction to review a state appellate court's decision which is a per curiam afffirmance, without opinion, of the

trial court's order.

Florida law is clear that an appellate court decision with no written opinion has no precedential value. Further, citation to a decision without opinion has no relevance for any purpose and is properly excluded from a brief and oral argument. Department of Legal Affairs v. District Court of Appeal, Fifth District, 434 So.2d 310 (Fla. 1983):

> "As noted before, this was a per curiam opinion with no reasons or authorities given and, although this may be sufficient to support a plea of res judicata as between the original parties, such per curiam affirmance opinion does not stand for any general pronouncement of principles of law that might have been urged by the parties in their pleadings and briefs." Department of Legal Affairs, supra at 312, citing Acme Specialty Corp. v. City of Miami, 292 So.2d 379, 380 (Fla. 3d DCA 1974).

A federal circuit court has held that memorandum opinions do not come under the stare decisis rule. Jones v. Superintendent, Virginia State Farm, 465 F.2d 1091 (4th Cir. 1972).

The petitioners claim that their rights to due process and equal protection have been infringed upon by the unconstitutional interpretation and application of a Florida Rule of Civil Procedure. The application of the procedural rule to the facts of this case, even if incorrect, could not create a substantial federal question because the decision has no precedential value. The District Court's opinion cannot be utilized by other Florida courts in a determination of how the rule of procedure should be applied. Consequently, the substantive issue is of no import to the public at large.

This Court has long held that the exercise of its discretionary certiorari jurisdiction should be reserved for cases involving issues of great public importance. As stated in Layne and Bowler Corp. v. Western Wellworks, 261 U.S. 387, 43 S.Ct. 422, 67 L.Ed. 712 (1923):

> "If it be suggested that as much effort and time as we have given to the consideration of

> the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head." Layne and Bowler, supra at 43 S.Ct. 422.

See also, Rice v. Sioux City Cemetery, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955).

The decision which is the subject of the Petition for Certiorari neither creates conflict with any other decision nor affects anyone but the civil litigants to this cause. As such, it fails to meet the rigid criteria this Court has historically exercised in determining which cases should be offered review by certiorari. As stated by Chief Justice Taft in Magnum Company v. Coty, 262 U.S. 159, 43 S.Ct. 531, 67 L.Ed. 922 (1923):

> "The jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this court merely to give the defeated party. . .another hearing." Magnum, supra at 43 S.Ct. 532.

If the court should deem it necessary to reach the merits, the final question presented is whether the decision of the District Court of Appeal amounts to an unconstitutional application of Rule 1.190(c), Florida Rules of Civil Procedure. Petitioners admit that there are no Florida cases wherein the procedural rule has been applied to facts such as those which exists in the instant case. Inconsistently, the petitioners argue that the procedural rule was "unequally" applied to themselves. The petitioners' claim that they have been denied equal protection is totally unsubstantiated where they are unable to cite one decision in which the procedural rule was applied differently under similar facts.

The petitioners' claim that the order below denies them due process is equally without merit. Both the trial court and the District

Court of Appeal found that the third amended complaint contained no allegations which could have ever brought the defendants within the court's jurisdiction. The District Court of Appeal in its decision affirming the trial court's order quashing service of process of the third amended complaint found that the complaint failed to allege jurisdictional facts sufficient to justify service on the respondents/defendants under any of Florida's long-arm statutes. (App. K.) The Florida cases dealing with the relation back of amendments relied on by the petitioners in the Petition for Certiorari do not remotely approach these facts.

The facts at bar are analogous to a situation wherein the complaint does not present a factual basis for service by publication on a non-resident defendant. In those case, there is no jurisdiction to proceed in the case and, in effect, as to the non-resident defendants the cause of action is a nullity. See, Klosenski v. Flaherty, 116 So.2d 767 (Fla.

1959); and Clark v. Realty Investment Center, Inc., 252 So.2d 589 (Fla. 3d DCA 1971).

The petitioners argue that under federal case law interpreting Rule 15(c), Federal Rules of Civil Procedure, the amended complaint would clearly relate back to the prior pleading citing Burnstein v. Columbia Broadcasting System, Inc., 291 F.2d 8 (7th Cir. 1961). In Burnstein, supra, the plaintiff in his statement alleging diversity jurisdiction pled that he was a resident of Michigan and the defendant corporations were not incorporated in Michigan. The plaintiff failed to allege that Michigan was also not the principal place of business of the defendant corporations. The court found that the omission was a defective allegation of jurisdiction subject to amendment pursuant to 28 U.S.C. § 1653. The court's interpretation of 28 U.S.C. § 1653 coupled with Rule 15(c), Federal Rules of Civil Procedure, resulted in a ruling allowing the amendment curing the defective jurisdictional allegations to relate

back to the date of an earlier pleading.

Burnstein, supra, is not applicable to the instant case because, firstly, Florida has no statute or rule such as 28 U.S.C. § 1653 which specifically provides for the amendment of defective jurisdictional allegations. Secondly, the pleadings in the instant case do not contain a mere defective jurisdictional allegation. Rather, the trial court found:

> "THE COURT: Those are the amendments. There are also a few on the -- on partnerships and dropping and entering parties. Problem is, your complaint does not set up any jurisdiction for anybody, and that's what I said once before, and that's what I -- I have not found anything to the contrary.
>
> Your amendment that you're talking about is to add another count or to change the wrong name of a defendant who you had jurisdiction over, but I don't know whether or not, the way I read those cases that I cited before, and the cases that -- that allow the relation back to doctrine, have anything to do with if you file a complaint that is improper jurisdictionally, and yours was improper jurisdictionally.

* * *

> THE COURT: That's true, but you can't file a lawsuit without any jurisdictional allegations and say it tolls the statute of limitations until you can figure out how to get service on somebody like that. You had no jurisdictional allegations and the Third District upheld it on that. Not that the service was bad, but that the complaint was jurisdictionally incorrect." (App. G, 6-7, emphasis supplied.)

The petitioners also rely on Kane v. Central American Mining and Oil, Inc., 235 F.Supp. 559 (U.S.D. N.Y. 1964). Kane, supra, was a stockholder's derivative action against officers, directors, and the majority stockholders of the corporation. Certain defendants claimed that service upon them was invalid because they were not served with a second amended complaint which raised an additional count based upon federal subject matter of jurisdiction. The court held that the defendants were properly served with the first complaint and that as the second count arose out of the same basic facts as the first count there was no need for the defendants to be

served twice. This case has no relevance to the one at bar. The respondents in the instant case were never properly served and the petitioners never filed a complaint containing allegations under which the defendants could have been served, prior to the running of the statute of limitations.

It is submitted that a federal case more analogous to the facts of the instant one is Lillibridge v. Riley, 316 F.2d 232 (5th Cir. 1963). This was a medical malpractice action where jurisdiction was based on diversity of citizenship. Suit was brought within the applicable limitations period, but diversity of citizenship did not exist at that time. The action was dismissed on the motion of the defendant. After the statute of limitations had run, the plaintiff refiled the action alleging that diversity existed. The plaintiff relied on the Georgia "renewal statute" giving six months to refile a dismissed case. The second case was dismissed as barred by the statute of limitations. This second dismissal

was affirmed on a determination that in order for the renewal statute to prevent the operation of the statute of limitations, the first suit must have been one in which the court had jurisdiction over the parties and subject matter. See also, Osman v. Drashovich, 314 F.Supp. 1115 (E.D. Wisc. 1970).

These cases stand for the proposition that, as a general rule, in the absence of a renewal statute, the reinstitution of an action during the pendency of which the statute of limitations has run is not permitted. Significantly, Florida has no "renewal statute". Equally significant, when the third amended complaint was filed, within the period of the statute of limitations, the court neither had nor could obtain jurisdiction over the defendants.

This cause was, therefore, not "commenced" against the respondents when the third amended complaint was filed because there were no allegations necessary to acquire personal jurisdiction and the complaint could never

support service of process against them. To argue that filing a complaint against defendants who, under the allegations of the complaint, could never be brought within the personal jurisdiction of the court tolled the statute of limitations is without merit.

H. Conclusion

For the reasons and upon the authorities cited above, the Petition for Certiorari should be denied.

Respectfully submitted,

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I. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing Brief of Respondent have been served upon Henry T. Courtney, Esquire, 1611 New World Tower, 100 North

Biscayne Boulevard, Miami, Florida 33132, by depositing in a United States post office or mailbox, with first-class postage prepaid, this 13th day of January, 1984.

Joe N. Unger

JOE N. UNGER

Respondents' Appendix A

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Respondents,

Excerpt from Brief of Petitioners/Appellants:

> WHETHER THE DATE OF FILING AN AMENDED COMPLAINT, CONTAINING NO NEW THEORIES OF LIABILITY, RELATES BACK TO THE DATE OF FILING THE PRIOR COMPLAINT FOR PURPOSES OF THE STATUTE OF LIMITATIONS.

Excerpt from Brief of Respondents/Appellees:

> WHETHER A COMPLAINT, FILED WITHIN THE LIMITATION PERIOD, CONTAINS NO JURISDICTIONAL ALLEGATIONS WHICH COULD BRING DEFENDANTS WITHIN THE JURISDICTION OF THE TRIAL COURT, THE STATUTE OF LIMITATIONS IS NOT TOLLED AND A SUBSEQUENT COMPLAINT WITH THE NECESSARY ALLEGATIONS FILED OUTSIDE THE PERIOD OF LIMITATIONS SHOULD BE DISMISSED.